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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 626

UNITED STATES OF AMERICA, *ex rel.*, CARTER-SCHNEIDER-NELSON, INC., a corporation,

Appellant,

vs.

JACK T. CAMPBELL, doing business as CAMPBELL CONSTRUCTION AND EQUIPMENT COMPANY, and FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,

Appellees.

UNITED STATES OF AMERICA, *ex rel.*, CARTER-SCHNEIDER-NELSON, INC., a corporation,

Appellant,

vs.

JACK T. CAMPBELL, doing business as CAMPBELL CONSTRUCTION AND EQUIPMENT COMPANY, and PHOENIX ASSURANCE COMPANY OF NEW YORK, a corporation,

Appellees.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

PAGE

Opinion below 2

Jurisdiction 2

Questions presented 2

Statutes involved 2

Statement 4

Reasons for granting the writ 6

I.

The decision of the Court of Appeals in the case at bar is contrary to the decision of the United States Supreme Court interpreting the notice requirements of the Miller Act 6

II.

The decision of the Court of Appeals in the case at bar is contrary to the leading decision in the Ninth Circuit Court of Appeals interpreting the notice provisions of the Miller Act 9

III.

The decision of the Court of Appeals in the case at bar is contrary to its own statement of law as pronounced in the reported decision in the within case 11

IV.

The decision of the Court of Appeals in the case at bar is contrary to the letter and spirit of the statute involved and unnecessarily and narrowly construes that section contrary to the United States Supreme Court's announced decisions that this act is to be liberally construed, thereby denying plaintiff a substantial right and depriving plaintiff of recovery of damages amounting to $33,678.42 13

PAGE

V.

The decision of the Court of Appeals in the Fort Funston action improperly applies a measure of damages that is contrary to decisions in other Circuit Courts of Appeal that have heretofore passed on this precise point..... 14

VI.

The issues presented in this petition are of far reaching importance and if the present decision of the Court of Appeals is allowed to stand, such a difference of ruling will be applied in the several circuits as to contribute to massive confusion in this area of the law..... 14

Conclusion 16

Appendix:

Plaintiff's Exhibit 4.....App. p. 1

Opinion of the United States Court of Appeals for the Ninth Circuit .....App. p. 3

TABLE OF AUTHORITIES CITED

CASES — PAGE

Bowden v. United States for the use and benefit of Malloy, 239 F. 2d 572, cert. den. 77 S. Ct. 864, 353 U. S. 957, 1 L. Ed. 2d 909 ..... 9, 10, 15, 16

Coffee v. United States for the use and benefit of Gordon, 152 F. 2d 968 15

Fleisher Engineering and Construction Company v. United States for the use and benefit of Hallenbeck, 61 S. Ct. 81, 311 U. S. 15, 85 L. Ed. 12, cert. den. 60 S. Ct. 715, 309 U. S. 677, 84 L. Ed. 1022, vacated on other grounds 60 S. Ct. 886, 309 U. S. 693, 84 L. Ed. 1034, cert. granted 60 S. Ct. 886, 309 U. S. 693, 84 L. Ed. 1034 ..... 6, 8, 15

Hallenbeck v. Fleisher Engineering and Construction Company, et al., 107 F. 2d 925 ..... 7, 13, 15, 16

Hopper Brothers Quarries v. Peerless Casualty Company, 255 F. 2d 137, cert. den. 78 S. Ct. 51, 358 U. S. 831, 3 L. Ed. 2d 69 15

Houston Fidelity and Casualty Company and Joe B. Evans et al. v. United States for the use and benefit of Trane Company, 217 F. 2d 727 15

McWaters and Bartlett v. United States for the use and benefit of Wilson, 272 F. 2d 291 ..... 11, 15

United States v. Campbell, 293 F. 2d 816 ..... 7, 8

United States v. Fleisher, 107 F. 2d 925 ..... 7, 8

United States for the use of Carter-Schneider-Nelson v. Campbell, 293 F. 2d 816 11

United States for the use of Susi v. Zara, 146 F. 2d 606 14

STATUTES

United States Code, Title 28, Sec. 1254(1) 2

United States Code, Title 40, Sec. 270(a)-(e) 2, 5

United States Code, Title 40, Sec. 270b 2, 10

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JACK T. CAMPBELL, doing business as CAMPBELL CONSTRUCTION AND EQUIPMENT COMPANY, and PHOENIX ASSURANCE COMPANY OF NEW YORK, a corporation,

Appellees.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners United States of America, *ex rel.*, Carter-Schneider-Nelson, Inc., a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on August 17, 1961 and from the order denying a petition for rehearing entered by the United States Court of Appeals for the Ninth Circuit on October 2, 1961.

Opinion Below.

The opinion of the Court of Appeals is reported at 293 F. 2d 816.

See appendix for full text of decision.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 17, 1961. The order denying the petition for re-hearing was made October 2, 1961. The jurisdiction of this court is invoked under 28 U. S. C. 1254(1).

Questions Presented.

Did the court below err in holding that the notices given by use plaintiff were insufficient compliance with the requirements of the Miller Act (40 U. S. C. 270b) to entitle plaintiff to recover against defendants Campbell and the Phoenix Assurance Company of New York?

Did the court below err in allowing recovery against defendant Campbell and the Fidelity and Casualty Company only for the time the equipment was actually used rather than the time it was available for use?

Statutes Involved.

The Miller Act (40 U. S. C. 270(a) through (e) inclusive).

Section 270(b) of 40 U. S. C. provides as follows:

"Section 270(b):

(a) Every person who has furnished labor or material in the prosecution of the work provided for

in such contract, in respect of which a payment bond is furnished under Section 270(a) of this title and who has not been paid in full therefor before the expiration of a period of ninety (90) days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *provided, however*, that any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon said payment bond upon giving written notice to said contractor within ninety (90) days from the date on which such person did or perform the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage pre-paid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States Marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expense of any such suit."

Statement.

Two separate actions were commenced in the District Court to recover from defendant Jack T. Campbell doing business as Campbell Construction and Equipment Company, the prime contractor, and two separate sureties on two separate United States Government construction projects.

In March of 1956 the petitioner, by written agreement, leased certain items of equipment to one Anderson-Kerber who was a subcontractor of Jack T. Campbell doing business as Campbell Construction and Equipment Company. This written lease agreement provided that the equipment was furnished for use on a certain United States Government construction project known as Fort Funston and San Bruno Mountain Ridge (hereinafter referred to as Fort Funston) which job was bonded by the Fidelity and Casualty Company of New York.

Between the lessor and the lessee, Anderson-Kerber, it was orally agreed that some of the equipment might be used by the lessee on another separate United States

Government construction project wherein the said defendant Jack T. Campbell doing business as Campbell Construction and Equipment Company was the prime contractor and wherein the defendant Phoenix Assurance Company of New York was the surety. This second United States Government construction contract was located at Travis Air Force Base, California (hereinafter referred to as Travis).

The two separate individual cases were consolidated for purposes of trial and were tried as a single, consolidated action in the United States District Court for the Northern District of California. In the *Fort Funston* case, judgment went in favor of plaintiff for $7,273.33. In the action relating to the Travis Air Force Base, judgment went against plaintiff entirely. This judgment was against plaintiff on the ground that plaintiff had failed to comply with the requirements of the Miller Act, 40 U. S. C. 270(a) through (e) inclusive, and in particular, that plaintiff had failed to give the requisite notice within the time required and in the manner required by said statute.

The total amount prayed for by plaintiff in the two actions was $43,112.65, of which amount $9,434.11 was attributable to the Fort Funston job and $33,678.42 related to the Travis job. By the court's ruling that the notices given were held to be inadequate to constitute compliance with the Miller Act, plaintiff has been deprived of judgment in the amount of $33,678.42. There was no evidence to the contrary relative to the extent of the use of equipment involved or the reasonable value thereof.

REASONS FOR GRANTING THE WRIT.

I.

The Decision of the Court of Appeals in the Case at Bar Is Contrary to the Decision of the United States Supreme Court Interpreting the Notice Requirements of the Miller Act.

Four separate written notices were received by the prime contractor defendant Campbell Construction and Equipment Company, which notices were plaintiff's Exhibit 2, dated September 17, 1956, plaintiff's Exhibit 3 dated November 8, 1956, plaintiff's Exhibit 4, dated January 21, 1957, and plaintiff's Exhibit 5 dated March 8, 1957. The following analysis relates specifically to plaintiff's Exhibit 4 being a letter from the plaintiff's attorneys to the surety on the Fort Funston job with a copy being sent to Campbell Construction and Equipment Company on January 21, 1957 and actually received and dated in the files of Campbell Construction and Equipment Company January 22, 1957, well within the 90 day period.

The leading case construing the notice provisions of the Miller Act is *Fleisher Engineering and Construction Company v. United States for the use and benefit of Hallenbeck (N. Y. 1940), 61 S. Ct. 81; 311 U. S. 15; 85 L. Ed. 12; Certiorari denied, 60 S. Ct. 715; 309 U. S. 677; 84 L. Ed. 1022; Vacated on other grounds, 60 S. Ct. 886; 309 U. S. 693; 84 L. Ed. 1034; Certiorari granted, 60 S. Ct. 886; 309 U. S. 693; 84 L. Ed. 1034.*

This case was reported at the circuit court level as *United States for the use and benefit of Hallenbeck v. Fleisher Engineering and Construction Company, et al.,*

(2 Cir. 1939), 107 Fed. 2d 925, which volume contains a more complete statement of the facts than does the reporting of the case in the decision by the United States Supreme Court. The parallel between the *Fleisher* case and the within case may be seen by the following analysis of the two cases:

United States v. Fleisher, 107 F. 2d 925	*United States v. Campbell,* 293 F. 2d 816 (the within case)
1. The notice consisted of a letter which was sent by ordinary mail. Pages 926, 927.	1. The notice consisted of a letter sent by ordinary mail.
2. The letter was addressed to the project engineer, a copy of the letter was sent to the contractor. Page 926.	2. The letter was addressed to the surety on the Fort Funston job, a copy of the letter was sent to the contractor.
3. A copy of the letter actually reached one of two joint venture contractors. Page 927.	3. Copy of the letter actually reached the prime contractor.
4. The letter notice reached the prime contractor within the 90 day period. Page 926.	4. The letter notice reached the prime contractor within the 90 day period.
5. The notice showed on its face the amount of the claim. Page 927.	5. The notice showed on its face the amount of the claim.

United States v. Fleisher, 107 F. 2d 925	*United States v. Campbell*, 293 F. 2d 816 (the within case)
6. The notice showed on its face that the claimant's contract was with a subcontractor of the prime. Page 926.	6. The notice showed on its face that the claimant's contract was with a subcontractor of the prime.
7. The notice described the items for which a claim was being made. Page 927.	7. The notice described the items for which a claim was being made.

The facts recited above from the text in the Second Circuit Court of Appeals are confirmed in the report of the decision of the United States Supreme Court at *311 U. S. 15, 18.*

Clearly the parallel between the facts in the *Fleisher* case which have received the approval of the United States Supreme Court and the facts in the case at bar is adequately demonstrated with regard to the notice of January 21, 1957. The previous notices which were sent in September and November of 1956 [Pltf. Exs. 2 and 3 respectively] contained substantially the same information and should have been sufficient to put the prime contractor on notice of the claimant's claim.

II.

The Decision of the Court of Appeals in the Case at Bar Is Contrary to the Leading Decision in the Ninth Circuit Court of Appeals Interpreting the Notice Provisions of the Miller Act.

The leading decision in the Ninth Circuit Court of Appeals interpreting the notice provisions of the Miller Act is *Bowden v. The United States for the use and Benefit of Malloy (C. A. Cal. 1956), 239 F. 2d 572; Certiorari denied, 77 S. Ct. 864; 353 U. S. 957; 1 L. Ed. 2d 909.*

The teaching of the *Bowden* case (*supra*), lays down three requirements of the written notice required by the statute (p. 577).

1. That the giving of such a written notice is a condition precedent to the right of suit.

2. That the writing must be sent or presented to the prime contractor by or on the authority of the supplier.

3. That the writing must inform the prime contractor *expressly or by implication* that the supplier is looking to the contractor for the payment of the subcontractor's bill (emphasis added).

In analyzing the notices that were sent in the within case and in particular, plaintiff's Exhibit 4, the letter dated January 21, 1957, the Ninth Circuit Court of Appeals in the within case acknowledges that a copy of the letter was sent to the prime contractor (p. 821) but concluded that this letter did not inform the prime contractor that the appellant is looking to the prime con-

tractor for payment. The specific language of the letter notice of January 21, 1957 with regard to that particular aspect of the notice requirement reads as follows:

> "Will you please advise us immediately of your intentions insofar as payment of this claim is concerned, since if it cannot be promptly paid. we will, of course, institute action under the Miller Act bonds."

This letter notice of January 21, 1957 was within the 90 day period, was addressed to the surety on the Fort Funston job but made internal reference in the letter to both the Fort Funston and Travis jobs, and a copy of the letter was sent to the prime contractor, Campbell Construction and Equipment Company which contractor was the prime contractor on both jobs. Can it be said that the last paragraph of this notice which has been quoted above does not expressly or by implication make demand upon the prime contractor?

It states specifically and expressly that suit on the Miller Act bonds (plural) will be instituted. This is certainly an implication that the claimant is looking to the prime contractor and its sureties. See Appendix for full text of letter.

The third condition set forth in the *Bowden* case (*supra*), namely that the writing must inform the prime contractor that the supplier is looking to the contractor for payment, is a condition *not* spelled out in the statute. (40 U. S. C. 270(b)) and was specifically rejected by the court of appeals of the Tenth Circuit in

McWaters and Bartlett v. United States for the use and benefit of Wilson (10 Cir. 1959), 272 F. 2d 291, 295 where the court stated as follows:

> "It was not essential that a demand be made upon McWaters for payment, although there was enough evidence from which it could be found that Wilson looked to McWaters for payment. The statute does not require a demand for payment. It requires only written notice of the claim. The purpose of the notice to the principal contractor is to enable him to protect himself against his subcontractor by withholding from him money due him on his subcontract."

III.

The Decision of the Court of Appeals in the Case at Bar Is Contrary to Its Own Statement of Law as Pronounced in the Reported Decision in the Within Case.

See: *United States for the use of Carter-Schneider-Nelson v. Campbell, 293 F. 2d 816 (Cal. 1961).* (See Appendix.)

At page 820 the 9th Circuit Court of Appeals stated the rule to be as follows:

> "We hold the correct solution of the problem is one advanced by appellant. It contends that the notice period runs from the time the equipment was last available for use on the project. In the instant case, the parties agreed by stipulation that December 5, 1956 was the last day on which any of the leased equipment was at the Travis jobsite."

It is also equally true that the unrefuted evidence shows that the appellant did not start to retake his equipment until approximately the 14th of December, 1956 [Rep. Tr. pp. 166 and 167]. The equipment was thus clearly available for use until the appellant started to retake it on the 14th or 15th day of December, 1956. Plaintiff's Exhibit 5 represents a registered letter dated March 8, 1957 and received by the prime contractor March 13, 1957 as shown by the return receipt attached to said letter. Thus the registered mail notice [Pltf. Ex. 5] was actually received by the prime contractor on the 89th day after the equipment was available for use on his job. This notice was by the appellate court's own statement adequate as to content (p. 820). Based on the appellate court's statement of the law, that time began to run the last day the equipment was available for use, it is clear that the notice was received within the 90 day period. Thus, the appellate court did not apply the very test which it itself enunciated in the decision in the within case.

IV.

The Decision of the Court of Appeals in the Case at Bar Is Contrary to the Letter and Spirit of the Statute Involved and Unnecessarily and Narrowly Construes That Section Contrary to the United States Supreme Court's Announced Decisions That This Act Is to Be Liberally Construed, Thereby Denying Plaintiff a Substantial Right and Depriving Plaintiff of Recovery of Damages Amounting to $33,678.42.

In *United States for the use and benefit of Hallenbeck v. Fleisher Engineering and Construction Company (supra)*, the Circuit court states that the object of requiring notice to the principal contractor was doubtless to enable him to withhold payments from the subcontractor until the latter should pay his own men who had worked on the job (p. 928). Further, the court stated a statute such as the Miller Act, giving a remedy on a payment bond to laborers and materialmen, is remedial, and under the authority, should be liberally construed. That this is the proper rule of interpretation is evidenced from the decision of the United States Supreme Court affirming the 2nd Circuit Court of Appeals, decision, 311 U. S. 15, 18.

In the within case, with notices in September of 1956 before the job was finished, also in November 1956, January 1957 and March 1957, the prime contractor was well aware that his subcontractor was leaving the claimant unpaid and therefore had adequate notice in plenty of time to withhold payments from his subcontractor, Anderson-Kerber. A fair and liberal construction of the notice statute would properly hold that the prime contractor received adequate and timely notice and the claimant should be permitted to recover.

V.

The Decision of the Court of Appeals in the Fort Funston Action Improperly Applies a Measure of Damages That Is Contrary to Decisions in Other Circuit Courts of Appeal That Have Heretofore Passed on This Precise Point.

Apparently the trial court and the Ninth Circuit Court of Appeals took the actual days use of the equipment on the Fort Funston job and divided these days by thirty in order to reduce them to months and then applied the monthly rate for the computation of the amount to which appellant was entitled. This computation is erroneous in that the actual days use was spread over a larger number of months than the reduction of the claim to months by a mathematical computation would indicate. Accordingly, the judgment of $7,273.33 should in reality be $9,434.11 predicated upon the time the equipment was available for use based upon the monthly rental rates over the entire spread of time the equipment was out of appellant's possession.

See:

United States for the use of Susi v. Zara (2nd Cir. 1944), 146 F. 2d 606, 612.

VI.

The Issues Presented in This Petition Are of Far Reaching Importance and if the Present Decision of the Court of Appeals Is Allowed to Stand, Such a Difference of Ruling Will Be Applied in the Several Circuits as to Contribute to Massive Confusion in This Area of the Law.

To permit the within decision to stand would create confusion, in that this decision in the Ninth Circuit would be contrary to the decision of the United States

Supreme Court and other circuit courts of appeal as indicated below.

(a) UNITED STATES SUPREME COURT AND SECOND CIRCUIT: *Fleisher Engineering and Construction Company v. United States for the use and benefit of Hallenbeck (supra). United States for the use and benefit of Hallenbeck v. Fleisher Engineering and Construction Company, et al. (2 Cir. 1939), 107 F. 2d 925.*

(b) FIFTH CIRCUIT. Oral notice has been held sufficient. *Houston Fidelity and Casualty Company and Joe B. Evans et al. v. United States for the use and benefit of Trane Company (5 Cir. 1954), 217 F. 2d 727. Coffee v. United States for the use and benefit of Gordon (5 Cir. 1946), 152 F. 2d 968.*

(c) EIGHTH CIRCUIT. A letter of *inquiry* to the prime contractor has been held sufficient notice. *United States for the use and benefit of Hopper Brothers Quarries v. Peerless Casualty Company (8th Cir. 1958), 255 F. 2d 137; Certiorari denied 78 S. Ct. 51; 358 U. S. 831; 3 L. Ed. 2, 69.*

(d) NINTH CIRCUIT. *Bowden v. United States for the use and benefit of Malloy (supra).*

This Ninth Circuit decision requires three elements of adequate notice (although one condition is not provided for by statute) but nevertheless, petitioner has met all three conditions.

(e) TENTH CIRCUIT. Oral notice and exhibition to the prime contractor of a writing constitutes adequate notice. *McWaters and Bartlett v. United States of America for the use and benefit of Wilson (10th Cir. 1959), 272 F. 2d 291.*

It is clear that in spite of the United States Supreme Court's rather clear enunciation of the law in the *Hallenbeck* case *(supra) that there continues to be* a difference of ruling in the several circuits and a lack of uniformity which needs once and for all to be put to rest by a decision of the United States Supreme Court in the within matter. Further, the rule enunciated by the Ninth Circuit in the *Bowden* case (*supra*) has not been followed in the within case nor has the very rule enunciated in the within case been followed by the Court in its ultimate decision on this matter. In accordance with the principle that the statute here involved is a remedial statute which should be liberally construed, and in order to insure that the decisions of all circuits are uniform and follow the decision of the United States Supreme Court in the *Hallenbeck* case *(supra)* it is respectfully submitted the within decision of the Ninth Circuit Court of Appeals should be reversed.

Conclusion.

The Petition for Writ of Certiorari should be granted.

Dated December 20, 1961.

Respectfully submitted,

KENNETH E. LEWIS,

Of Counsel:

ANDERSON, MCPHARLIN & CONNERS.

APPENDIX.

Plaintiff's Exhibit 4.

January 21, 1957

801-81E

Fidelity & Casualty Co. of New York
60 Sansome Street,
San Francisco, California

Re: Carter-Schneider-Nelson, Inc.
Campbell Construction and Equipment Co.

Gentlemen:

This firm represents Carter-Schneider-Nelson, Inc., which in March, 1956, rented to Anderson-Kerber Co., Inc., a subcontractor under Campbell Construction and Equipment Co., certain items of construction equipment consisting of a Bros. Pneumatic Compactor, Adams Motor Grader, 3 Caterpillar Diesel Tractors and Dozers and a White Water Wagon for the agreed rental of $6,116.00 per month. This equipment was rented for and used on the Fort Funston and San Bruno Mountain Ridge job, Contract No. DA-04-203 ENG-4275, with some of it being used on the Nike installation job at the Travis Air Force Base. We have been informed by the Corps of Engineers that your company furnished the Miller Act bond on both these jobs as surety for Campbell Construction and Equipment Co.

The above-mentioned equipment was employed on said jobs until December 15, 1956, at which time the equip-

ment was returned to Carter-Schneider-Nelson, Inc., except for one Caterpillar Tractor. There is now due, owing and unpaid to Carter-Schneider-Nelson, Inc. a balance of $45,737.17 as of December 15, 1956, for the rental of this equipment, plus the additional amount that accrued since that time for the rental of the one Caterpillar Tractor, plus the cost of any repairs for damage other than reasonable wear and tear, plus also the interest that has accrued on this indebtedness.

Will you please advise us immediately of your intentions insofar as payment of this claim is concerned, since if it cannot be promptly paid, we will, of course, institute action under the Miller Act bonds.

Yours very truly,

ELDON V. McPHARLIN

EVM:ttm

1-21

cc to Campbell Construction and Equipment Co.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

United States of America, ex rel, Carter-Schneider-Nelson, Inc., a corporation, Appellant, v. Jack T. Campbell, doing business as Campbell Construction and Equipment Company, and Fidelity and Casualty Company of New York, a corporation, Appellees.

United States of America, ex rel, Carter-Schneider-Nelson, Inc., a corporation, Appellant, v. Jack T. Campbell, doing business as Campbell Construction and Equipment Company, and Phoenix Assurance Company of New York, a corporation, Appellees. Nos. 17,181 and 17,182. Aug. 17, 1961.

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before: Barnes, Hamlin and Jertberg, Circuit Judges

Barnes, Circuit Judge:

These are two suits under the Miller Act. Jurisdiction in the trial court was based upon 40 U. S. C. §§270(a) through (d). Jurisdiction in this court rests upon 28 U. S. C. §1291.

Appellant is a lessor of earth moving equipment. In March 1956 it leased such equipment to Anderson-Kerber Co., a subcontractor engaged in work on public works projects at Fort Funston and Travis Air Force Base. The prime contractor on both projects was appellee Campbell Construction and Equipment Company (Campbell). The original lease arrangement contemplated use of the machinery at Fort Funston and

not elsewhere, but a subsequent oral modification, provided that the subcontractor could use the equipment at Travis.

After the subcontractor had been in default on the rent for several months, appellant brought an action, under the Miller Act (40 U. S. C. §§270(a) through (e)), against Campbell, the general contractor, and Fidelity and Casualty Company of New York (Fidelity), the surety on the Fort Funston project. A separate Miller Act action was brought against Campbell and Phoenix Assurance Company of New York (Phoenix), the surety on the Travis project. The two actions were consolidated for trial but were concluded by separate judgments.

Appellant was granted no relief in the action against Phoenix. The court held that appellant had not given timely notice of his claim as required by the Miller Act. In the action against Fidelity, appellant was awarded a judgment in the sum of $7,273.33 for the reasonable value of the machinery used at Fort Funston. Appellant has taken appeals from both judgments.

I—APPEAL OF THE ACTION AGAINST FIDELITY:

A. In this appeal appellant claims that the judgment in its favor was insufficient in amount. Further, appellant claims, the court erred in not awarding it prejudgment interest on the judgment recovered.

Appellant contends that it should receive rental payments for the total period during which the equipment was out of its possession. Appellant notes that it rented the equipment to a single subcontractor working under a single prime contractor. It would not be faced

with its present difficulty, it maintains, were it not for the facts that the equipment was used on two jobs and that the prime contractor chose a different surety for each job.

Appellant does not contend, however, that the surety on the Funston project should be held for the whole amount of rental allegedly due for equipment used on both projects. It admits that such a result would be inequitable. Furthermore such a result would be beyond the contemplation of the Act. 40 U. S. C. §270(b) makes the surety liable only for material supplied in connection with the bonded project.

Appellant does contend, however, that the amount awarded it in connection with the Funston project was inadequate. The court granted a judgment of $7,273.33 against Fidelity; while appellant claims that it is entitled to a judgment of $9,654.11. The court's computation of the unpaid rent is in error, appellant claims, because it is based upon the *actual use* of the equipment at the Funston project; appellant should be compensated, it contends, for the time during which the equipment was *available* for use at Funston, even if it was not actually used all the time. This, however, is a false issue (and the battle of case authority which the parties have engaged in with respect to it is irrelevant), for the court's computations purport to award rent for the time during which the equipment was "located at" Funston (Findings IV and V, especially at pp. 67 and 69 of the Record, Volume I in appeal No. 17181). And it does not appear that "available at" means anything other than "located at," especially when it is noted (as will be seen below) that appellant's computation of the "availability" of particular equipment at various

places corresponds significantly and almost precisely with the court's computation of when the equipment was "located at" those places. We note that appellant has not explicitly attacked the court's findings with respect to the location of the equipment at various relevant times, nor has it alleged that those findings are not supported by substantial evidence.

The disagreement between the court's figure and appellant's can be understood only by comparing their methods of computation. The manner in which appellant finally arrived at its figure of $9,654.11 appears on page 26 of its Opening Brief. There it notes that the total rental for the two items of equipment which were used in part at Funston was $17,766.67. It would then *allocate* to the Funston project a portion of this total rental in accordance with its calculation of the time during which the equipment was available for use at Funston. It determined that the two tractors in question were "available" for use at Funston for a total of two hundred and thirty-two days and at Travis for a total of two hundred and seventy-six days, a grand total of five hundred and eight days. So, appellant apportions to Funston 232/508 of the total rental on the two tractors. Interestingly enough, the court's computation (see Record, Vol. I in appeal No. 17181, p. 67) establishes that the two tractors were located (and therefore available for use) at Travis and Funston for a grand total of five hundred and seven days, the period of availability at Funston being two hundred and fifty days, eighteen days *more* than the period revealed by appellant's calculations. Yet the court arrived at a rental figure substantially lower than that computed by appellant. This is because the court's computation takes

into account the fact that all rent was paid through May 27, 1956. The court limited its award to rent accruing after that date. Thus Tractor No. 1 was located at Funston for only one hundred and seven days after May 27th, and only the rent accruing during this time was allowed. Similarly Tractor No. 2 was located at Funston for only fifty-seven days after May 27th, and the court allowed recovery only for rent accruing during this period. Appellant's computation also takes into account the rent paid prior to May 27th; but it apportions this rent to each of the six items in the proportion which the total rent paid bears to the total rent due. (See Appellant's Opening Brief, p. 25.) The total rent paid, $12,232.00 is approximately twenty-two and sixty-four one hundredths per cent of the total rent due, $54,024.33. For that reason appellant allocated $2,400 of the total rent paid to "Cat. [*i.e.*, Tractor] #2" and a like amount to "Cat. [Tractor] # 3", because this figure is twenty-two and sixty-four one hundredths per cent of the total rent due ($10,600) for each of these items. There is no compelling reason to accept appellant's method of calculation, for not all of the items were used for the same period of time before May 27th, and the items used at Fort Funston were in use before May 27th for a longer time than any other items. (For example, Cat. #3 which was not put in use until April 17, 1956 (see Record, p. 67) receives as much rent-paid credit ($2,400) under appellant's computation as Cat. #2 which was put in service on March 27, 1956.) The court's method of computation is entirely accurate: it permits appellant to recover all rent accruing on those items located at Funston after May 27, 1956. And appellant has received all the pre-May 27th rent accruing on such items.

Appellant's claim for additional compensation has nothing to do with its contention that the court based its findings on the "use" rather than the "availability" of the equipment. Appellant's numerous case citations on this issue are, therefore, not in point.

B. Interest.

The trial court refused to award pre-judgment interest to appellant on its recovery. Appellant claims that this was error, relying on Cal. Civ. Code §3287 which permits the recovery of interest on damages from the time that the right to such damages becomes vested. Such pre-judgment interest is recoverable, however, only if the damages are certain or capable of being made certain by calculation. The court, in the instant case, held that the amount claimed was in dispute and uncertain because plaintiff sought in each complaint, rental in excess of any possible amount that it was entitled to recover. Appellant counters that it had no choice but to claim the full amount of unpaid rent against both sureties for it then had no access to the records of the subcontractor and therefore no basis for allocating the rental charges between the two jobs. Whatever the reason behind appellant's position may be, it is clear, in view of the hot dispute over the proper principle of allocating the rent already paid, that the amount due appellant could not be made certain by mere calculation. The court was correct in refusing interest on the ground that the claim was unliquidated (see James Stewart Co. v. Dennett Robertson Electric, Inc., 9 Cir. ..... F. 2d ..... (decided May 31, 1961, No. 16,974)).

We affirm the judgment of the trial court in the appeal number 17181 arising out of the action against Fidelity.

II—APPEAL IN THE ACTION AGAINST PHOENIX:

The Miller Act provides (40 U. S. C. §270(b)) that a claimant seeking recovery for materials provided to a subcontractor must give written notice to the prime contractor, "within ninety days from the date on which such person . . . supplied the last of the material for which claim is made, stating with substantial accuracy the amount claimed. . . ." The giving of such notice is a condition precedent to a supplier's right to sue on the payment bond. Bowden v. United States, 9 Cir. 1956, 239 F. 2d 572, 577, *cert. denied* 353 U. S. 957. Appellee Phoenix asserted that appellant failed to give the notice required by the Miller Act and that therefore its claim was barred. The trial court agreed.

A. The first problem in this appeal is to determine when the time for giving notice expired. Appellee asserts that the ninety days begins running when the lessor delivers the equipment. Since the last equipment supplied to the Travis job was delivered on May 17, 1956, the last date for giving notice, appellee claims, is August 17, 1956. Appellee's view is based upon an analogy to the furnishing of materials, since the Miller Act itself, does not in so many words deal with the furnishing of equipment. With respect to materials the crucial date to start the notice period is, of course, the date the materials are delivered. So, by analogy appellee arrives at the conclusion that the crucial date for equipment is the date the equipment is delivered.

The lack of merit in appellee's position seems obvious. Delivery of the materials completes the seller's obligation, and full payment becomes due either at once or at a specified time thereafter. Delivery of equipment

under a lease, on the other hand, is only the beginning of the lessor's obligation. He must allow the equipment to remain in the hands of the lessee for such time as is specified by the lease arrangement. Payment is not due at once but at various times during the lease period, usually on a periodic basis. Under appellee's theory, a lessor would, more frequently than not, have to file a Miller Act notice even though the lessee is not in default. If the lease was to run for more than three months, the lessor, in order to protect his rights would have to file a notice after three months, even though the lessee had met every rental payment promptly.

We hold the correct solution of the problem is the one advanced by appellant. It contends that the notice period runs from the time the equipment was last available for use on the project. In the instant case, the parties agreed by stipulation that December 5, 1956, was the last day on which any of the leased equipment was at the Travis job site. Thus the one notice which the court found to be adequate from a content standpoint was not timely. This is Plaintiff's Exhibit No. 5, a letter *dated March 8, 1957,* and mailed to the contractor (Campbell) on March 12, 1957.

The court found, further, that all the other notices which were mailed within the required time were defective in substance. To test the court's determination on this point, we must inquire into the required contents of a Miller Act notice. Both parties cite Bowden v. United States, *supra,* p. 577, to establish the notice requirements. There the court states that the notice must be in writing; must be sent to the prime contractor; and must inform him that the supplier is looking to him for payment. Against these standards, the

court tested the three communications sent by appellant within the period specified in the Miller Act. As the trial court pointed out, Exhibits 2 and 3 (letters dated September 17, 1956, and November 8, 1956) might have been adequate notices under the Funston bond, but they make no reference to the Travis job. They simply fail to make any reference, express or implied, to the oral contract permitting use of the rented equipment on the Travis project. The letter of January 21, 1957 (Exhibit 4) is also inadequate. It specifically mentions the Travis job, but it was sent to the surety on the Funston job. A copy was, it is true, sent to the prime contractor, but it does not inform the prime contractor that appellant is looking to it for payment. Rather, the letter addresses the surety and asks it about its intentions regarding payment of the claim.

It is our opinion that the trial court was correct in rejecting all notices on the ground that no one of them complied with the requirements of the Miller Act.

B. , Appellant asserts that regardless of the propriety of the trial court's conclusion on the notice issue, the court erred in failing to make findings, as required by Rule 52 (Fed. R. Civ. P.), on all disputed issues in the case. The court, in the action against Phoenix, did not make findings as to the time the equipment was available for use at Travis. If the court did err, in failing to make the findings, the error was harmless. Since the court's correct conclusion on the notice issue precludes any recovery by appellant, findings on the "availability" issue would be mere surplusage. Such findings are not needed in order to aid this court in reviewing the decision below, and the absence of such findings is clearly no cause for reversal. If, on the other hand, this court should have determined that the

trial court erred on the notice issue, then we would have been required to send the matter back to the trial court for a determination of appellee's liability. But we have held the court did not err on the issue of notice. The trial court's failure to make findings on all disputed issues is therefore a makeweight which cannot affect the outcome of the case.

C. Since we have accepted the trial court's conclusion on the notice issue, we need not consider the next issue, raised by appellee. We, however, deem it advisable to express our views on this matter.

Appellee, as a precaution, argues that the rental agreement was in fact not a lease but a conditional sale contract covering capital equipment which was not totally consumed on the Miller Act jobs. Thus, appellee contends, the Miller Act bonds do not cover appellant's claim. The basis of appellee's contention is fairly and accurately summarized by the trial court in his opinion in the action against Fidelity (No. 17181), since Fidelity also raised the issue in the trial court. And the trial court's answer to the contention, also contained in the opinion, is clear and convincing, and we here adopt it:

> "Defendants draw attention to the provisions in the agreement under which Anderson-Kerber was to pay $6116.00 per month commencing with March 20, 1956, until and including October 20, 1956, and to the fact that it provided that if payments were so made, Anderson-Kerber would have the privilege of purchasing the equipment at the exact amount of the payments set forth in the agreement. Notwithstanding the fact that the agreement designates the transaction as a rental it

is contended that the agreed payment of the total value of the equipment within seven months compels the conclusion that a sale or conditional sale was involved. . . .

The fact that Anderson-Kerber was given an option to retain the equipment upon payment of the last installment raises some question as to the true meaning of this contract; however, a definitive determination of that issue must take account of all the provisions of the agreement as well as of the intent of the parties to it. . . . The agreement here is entered into for a minimum rental period of one month, expressly provides for monthly payments over a stipulated period of time and for the retaking of the equipment by the lessor without any compensation to the lessee in the event of default. Moreover, evidence was introduced that the type of agreement here involved is often resorted to by lessors of earth moving equipment and is regarded in the trade as the usual leasing agreement. Expert testimony indicated to the court that the total monthly rental set forth was not unreasonable for rental of the type of equipment involved. In view of the language of the contract and the evidence adduced, this court will treat the contract as what it purports to be i.e. a lease."

The trial court's conclusion upon this issue is thus a determination of fact based in large measure upon the trial court's evaluation of expert testimony. Under these circumstances, the trial court's judgment cannot be described as clearly erroneous. To the contrary, the trial court's evaluation of the situation appeals to us as quite sound.

D. One further contention in connection with this issue is raised by appellant. Appellant claims that since appellee did not appeal from the judgment, it cannot now question the trial court's determination that the agreement involved is a lease. This contention is without merit. Generally a non-appealing appellee may raise errors in order to *sustain* the judgment below (see 5 C.J.S. 847), although he may not do so in order to obtain a modification of the trial court's judgment (*Id.* at 843). Thus appellee Fidelity could not have raised the point on appeal (and it did not), but it was perfectly proper for Phoenix to do so.

III—CONCLUSIONS:

In appeal No. 17181, the only questions are the court's refusal to award pre-judgment interest and the proper method of allocating the pre-May 27, 1956, rental which had been paid by Anderson-Kerber. The court's computations properly allocated the rent paid to the period for which it was paid; its refusal to award pre-judgment interest is legally justified under the facts of the case. We *affirm* the judgment in appeal No. 17181.

In appeal No. 17182, the fundamental issue is the adequacy of the Miller Act notices. None of the notices sent by appellant to the prime contractor constitue a timely, unequivocal demand upon such contractor to pay the rental accruing in connection with items used on the Travis project. The district court, therefore, did not err in refusing to award judgment against the surety. We *affirm* the judgment in appeal No. 17182.

(Endorsed) Opinion Filed Aug. 17, 1961.

Frank H. Schmid, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 626

UNITED STATES OF AMERICA, ex rel., CARTER-SCHNEIDER-NELSON, INC., a corporation,
Appellant,
vs.
JACK T. CAMPBELL, doing business as CAMPBELL CONSTRUCTION AND EQUIPMENT COMPANY, and FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,
Appellees.

UNITED STATES OF AMERICA, ex rel., CARTER-SCHNEIDER-NELSON, INC., a corporation,
Appellant,
vs.
JACK T. CAMPBELL, doing business as CAMPBELL CONSTRUCTION AND EQUIPMENT COMPANY, and PHOENIX ASSURANCE COMPANY OF NEW YORK, a corporation,
Appellees.

Brief of Appellees Jack T. Campbell, Doing Business as Campbell Construction and Equipment Company, and Fidelity and Casualty Company of New York, a Corporation, in Opposition to Petition for Writ of Certiorari

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In the separate suit where judgment was entered by the trial court and affirmed by the Court of Appeals in favor of petitioner and against Campbell and Fidelity and Casualty Company of New York, the petitioner prays for a writ of certiorari on the basis that the decision of the Court of Appeals is contrary to decisions in other Circuit Courts of Appeal and cites in support of that statement the case of *United States for the use of Sasi v. Zara* (2nd Cir. 1944), 146 Fed. 2nd 606, 612.

Petitioner contends that a recovery should have been predicated upon the time the equipment was available for use at the Fort Funston job based upon the monthly rental rates for the entire spread of time the equipment was out of appellant's possession rather than for the time that the equipment was actually available for use.

Petitioner was allowed rent for the equipment for the time that it was actually located at Fort Funston and apparently complains because rental was not allowed after the work for which the particular piece of equipment was required was completed and the equipment had been removed from the job by the subcontractor and never returned to the job.

It must be recalled in the present case that the equipment was leased to a subcontractor of the general contractor and that the subcontractor had the right to move the equipment at will from the job to other places and after it was removed from the Fort Funston job, the general contractor had no control over it and no way of knowing whether it had been returned to the lessor or moved to other places with the lessor's consent.

Only two pieces of the rented equipment were used at or located at the Fort Funston job after May 27, 1956. The Court allowed rental on one piece of that equipment until

November 2, 1956 and on the other until January 15, 1957, the dates on which each was removed from the jobsite by the subcontractor.

The time for which the equipment was leased expired on October 20, 1956. No rental had been paid for its use after May 27, 1956.

The work for which each piece of equipment had been employed and had been used was fully completed when such piece was removed from the jobsite and there was no further need or use for it at the jobsite.

In the opinion of the Court of Appeals, contained in the appendix to the petition for writ of certiorari, the Court of Appeals fully answers the contentions of petitioner. (Appendix pages 4 to 8 inclusive)

There is no similarity between the facts in the present case and the facts in the case of *U.S. for the use of Susi Contracting Co. v. Zara Contracting Co.*, 146 Fed. 2nd 606, 612, cited by petitioner.

In that case, the general contractor breached the subcontract and took possession of and utilized the equipment furnished by the subcontractor at the contract site. The Court held the general contractor and his surety were to be charged rental for the time of retention of the equipment and not merely for the hours of use.

In the instant case, there was no retention of the equipment by the general contractor at any time. While it was at the site of the work it was in the possession of the subcontractor. After the work for which it was needed had been fully completed and it was removed from the jobsite, it was not in the possession of, or available for use by the general contractor. The situation here is different than if the equipment had originally been leased to the general contractor and he had retained it after it was no longer needed at the

jobsite or had leased it to someone else or had used it elsewhere without the knowledge or consent of the lessor.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted.

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Appellees.

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SUBJECT INDEX

Page

Introduction ... 1

Statement of Facts and Pleadings Pertinent to Opposition to the Petition ... 2

Reasons for Denying the Petition for Certiorari ... 3

I. The Decision in the case at bar is not contrary in any respect to the decisions of the United States Supreme Court, the Court of Appeals of other Circuits or the Court of Appeals of the 9th Circuit ... 3

II. The decision in the case at bar is in complete accord with the Miller Act, the decisions of the United States Supreme Court and the decisions of the several Courts of Appeals ... 9

III. Response to miscellaneous general statements contained in the petition ... 11

IV. No error was committed in holding that use plaintiff's Exhibit 4 was inadequate notice ... 13

Summary ... 14

TABLE OF AUTHORITIES CITED

Cases	Pages
Bowden v. United States (9th Cir. December 31, 1956), 239 Fed. 2d 572; cert. denied 77 S. Ct. 864	8, 10, 11
Coffee v. United States for the use and benefit of Gordon (5 Cir. 1946), 157 Fed. 2d 968	5, 6
Douds v. Seafarers International Union, 148 F. Supp. 953	11
Fleisher Engineering & Construction Company v. United States of America for the use and benefit of George S. Hallenback, 311 U.S. 15, 61 S. Ct. 81, 85 L. Ed. 12	4, 5, 10
Houston Fire and Casualty Ins. Co. v. U.S. for the use of Trane Co. (5th Cir. 1954), 217 Fed. 2d 727	6
Kunglig v. Dexter & Carpenter, Inc., 32 Fed. 2d 195	11
MacEvoy Company v. United States of America for the use of Calvin Tomkins Company, 322 U.S. 102, 64 S. Ct. 890, 88 L. Ed. 1163	10
McWaters & Bartlett v. U.S. for the use of Wilson (10th Cir. 1959), 272 Fed. 2d 291	7
United States for the use and benefit of Hopper Bros. Quarries v. Peerless Cas. Co. (8th Cir. 1958), 255 Fed. 2d 137	6, 7
United States v. Campbell, 293 Fed. 2d 816	2
U.S. v. Northwestern Engineering (8th Cir. 1941), 122 Fed. 2d 600	7

Statutes	
The Miller Act, 40 USC 270(b)	2, 3, 4, 8, 9, 10, 11, 13, 14

Other Authorities	
H. Rep. No. 1263, page 578 (74th Cong. 1st Sess.)	9

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Appellees.

Brief in Opposition to Petition for Writ of Certiorari

INTRODUCTION

The petition for certiorari deals with two distinctly separate cases and in each case an entirely different question is raised. This brief in opposition to the petition is on behalf of the defendant parties to the Miller Act bond on the contract for Nike installations at Travis Air Force Base. This action in the District Court was No. 36746, and before the Court of Appeals was Appeal 17182. While the Travis Air Force Base case was consolidated with another case involv-

ing Fort Funston for the purpose of trial, separate opinions and separate judgments were rendered by the trial court judge. The Court of Appeals wrote only one opinion, but carefully dealt separately with each case.

The District Court and the Court of Appeals both held that use plaintiff had not given timely notice of his claim as required by the Miller Act.

The sole question presented, insofar as this action is concerned in connection with the petition for certiorari, is whether or not the courts below so erred in holding that the notice was not timely or proper under the Miller Act as to cause this Court to grant a petition for certiorari.

It is the position of these successful defendant parties to the action involving Travis Air Force Base that the courts below did not commit error and that both decisions below are in full accord with the decisions of this Honorable Court, the decisions of the Court of Appeals of other Circuits, and prior decisions of the Court of Appeals of the 9th Circuit.

STATEMENT OF FACTS AND PLEADINGS PERTINENT TO OPPOSITION TO THE PETITION

The claim of use plaintiff is for equipment supplied to a subcontractor. By stipulation, December 5, 1956 was the last day that any of the equipment was at the jobsite or available for use (Volume II, Record Page 164; *United States v. Campbell*, 293 Fed. 2d 816 at 820). By the evidence, December 3, 1956 was the last day that any of the equipment was used on the job (plaintiff's Exhibit H).

Nowhere in the record is there one scrap or iota of evidence that the general contractor, or the surety, on the Travis Air Force Base job knew, or had any reason to believe, that equipment owned by use plaintiff was being used on the job. The equipment did not even bear any identifying marks.

Paragraph X of the complaint in this action (Volume I, Record Page 8) sets forth the notice upon which use plaintiff, under oath, relied. This notice was dated March 8, 1957 more than ninety days after December 5, 1956), and was alleged to be a notice mailed by registered mail, addressed to the general contractor, stating with substantial accuracy the amount of rental accrued and unpaid. This is not the notice relied upon as the basis for this petition and set forth on pages 1 and 2 of the appendix to the petition. No amendment has ever been offered by use plaintiff to its pleading, and use plaintiff is bound by the verified allegations of its complaint.

The notice set forth on pages 1 and 2 of the appendix to the petition is addressed to the surety (not even the general contractor) on the other job, Fort Funston, involved in the companion case. Further, plaintiff's Exhibit 4 on pages 1 and 2 of the appendix to the petition is artfully incomplete. The actual letter of January 21, 1957, was on the letterhead of Anderson-McPharlin & Conners and signed by a partner in that firm, Eldon V. McPharlin. By request for admission 16 and the answer thereto and by reference to the transcript Volume II, Record 203, it is admited that this firm (and Eldon V. McPharlin, the attorney signing the letter) is admittedly one of the leading firms of attorneys for contractors and bonding companies in the State of California.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I. The Decision in the case at bar is not contrary in any respect to the decisions of the United States Supreme Court, the Court of Appeals of other Circuits or the Court of Appeals of the 9th Circuit.

Petitioner has argued that the decision in the case at bar is not in accord with decisions of this Court and several Courts of Appeals announcing the rule that the Miller Act

must receive a liberal interpretation and holding, in very proper cases, that the notice requirements of the Act should specifically receive liberal interpretation.

The point, however, is this: in each decision referred to in the petition for certiorari, the Supreme Court or the particular Court of Appeals was dealing with a factual situation where the general contractor did in fact have actual notice of the use of the equipment and of the potential claim of the use plaintiff. In such cases, the parties to the Miller Act bond (the general contractor and the surety) sought nakedly to rely on the technical failure of some uninformed supplier of material or equipment to send notice in exactly the manner required by the Act. Such a factual situation is not here present.

The cases cited by petitioner will be reviewed separately and briefly to illustrate to this Honorable Court that there is no reason for granting a petition for certiorari:

(1) *Fleisher Engineering & Construction Company v. United States of America for the use and benefit of George S. Hallenback*, 311 U.S. 15, 61 S. Ct. 81, 85 L. Ed. 12, also reported before the Court of Appeals at 107 F.2d 925:—The sole question before the Supreme Court of the United States is stated by the court, at page 17 of the U.S. Reports and at page 14 of the Law Edition Reports to be:

> "The question is whether the giving of the required written notice to the contractor was sufficient, as it was not sent by 'registered mail'."

It was conceded in the case that there was actual written notice, though not registered, and that the contents of the notice were adequate.

The Supreme Court stated:

> "The Circuit Court of Appeals held that as the receipt of written notice was conceded and the contents of the notice were adequate, the statute was satisfied."

The Court of Appeals, at page 928, stated:

> "It is admitted that the notice was in writing and sent by mail and reached one of the two contractors."

In the primary case relied upon by petitioners, there is then absolutely no conflict for the questions raised in the case at bar and in this petition were not even considered by the Supreme Court or the Court of Appeals.

(2) *Coffee v. United States for the use and benefit of Gordon* (5 Cir. 1946), 157 Fed. 2d 968:—The sole question in this case involved the method of service or transmittal of actual notice to the general contractor, Coffee. The decision of the Court of Appeals affirms the judgment below and the findings of the trial judge as follows:

> "*About the middle of June, 1941, well within the 90 day period*, Gordon called on C. G. Coffee, one of the partners of Coffee Construction Company . . . and advised Coffee of the balance due from Smith and Rose (the subcontractors) to Gordon. At the same time Gordon *handed* Coffee a statement in writing of the sums Gordon claimed to be due him from Smith and Rose on account of the work above mentioned. The various items of indebtedness were summarized on the written statement which showed that Smith and Rose owed Gordon $8,279.38 and Gordon explained to Coffee the entire situation and discussed the account with him. Coffee *had actual manual possession* of the written statement and full opportunity to examine it, *having held it in his hand* during the discussion. . . ."

The court in *Coffee* then held, following the Supreme Court in *Fleisher Engineering & Construction Co. v. United States*, supra, at 970 in effect, that "registered mail notice" was not necessary and that "a writing containing the information which the statute requires, exhibited to the contractor by the claimant as a notice of his claim and which the

contractor examines and discusses and might have taken if he desired, was a written notice sufficiently served" (particularly in the light of certain Florida statutes authorizing the service of a summons by reading the summons to the person to be served). Absolutely nothing more is involved in the *Coffee* case than that which we have stated and the court did not even consider the question of timeliness of the notice or adequacy of the notice.

(3) *Houston Fire and Casualty Ins. Co. v. U.S. for the use of Trane Co.* (5th Cir. 1954), 217 Fed. 2d 727; in this case there was concededly no written notice whatsoever; there was concededly oral notice and the general contractor had written to the claimant fully acknowledging the notice and giving full recognition to the indebtedness of the subcontractor to Trane. The Court of Appeals states:

> "(This) . . . was more effective than if a written notice had been sent by the materialmen and fully complied with the essential statutory requirements of bringing home in writing to the principal contractor the requisite knowledge of the claim and debt."

Here again, as distinguished from the case at bar, the general contractor had full actual and complete notice of the claim.

(4) *United States for the use and benefit of Hopper Bros. Quarries v. Peerless Cas. Co.* (8th Cir. 1958), 255 Fed. 2d 137: Here again the general contractor had actual notice and acted on it as if there had been proper notice. The language of the court at page 142 is as follows:

> "Under the circumstances of this case the plaintiff's letter to the contractor of August 6, 1953, received by the contractor the next day and answered on the following day, must be deemed a giving of written notice by the materialman to the contractor. The contractor accepted it as such and in accordance with it notified

> Anton, Hammond, Dunn, Inc. that the plaintiff materialman had not been paid by the subcontractor and was making demand for payment".

It is also noteworthy that in the *Peerless* case the bonding company involved for all parties was the same and that the court, on page 146 recognized that stricter cases such as *U.S. v. Northwestern Engineering* (8th Cir. 1941), 122 Fed. 2d 600 should not control where the general contractor admittedly had, or should have had, some actual notice within the 90-day period. The facts and holding of *Peerless Casualty* are clearly different from those in the case at bar.

(5) *McWaters & Bartlett v. U.S. for the use of Wilson* (10th Cir. 1959), 272 Fed. 2d 291: the appeal on the Miller Act feature of the case deals solely with the sufficiency of the evidence regarding the giving of notice. No substantial question of law was involved at all. The court stated, at page 294:

> "While, of course, there is other evidence from which appellant seeks to draw its conclusions, we think the evidence outlined above is sufficient to support the court's finding that written notice of Wilson's claim was served upon McWaters and was brought home to him. . . . If the above evidence is believed, as it was by the court, it establishes that a written claim was served on McWaters. He saw the writing, and knew that the amount was claimed from Clark, his subcontractor, for work and labor performed in fulfillment of the contract."

As distinguished from the case at bar, there was again actual notice to the general contractor. It is also interesting to note that claimant Wilson was apparently a small specialized contractor supplying labor and material to a general contractor and his attempts at notice (which very pointedly resulted in actual notice) may be viewed with some sym

pathy; whereas in the case at bar the attempts of attorney McPharlin, a leading bonding company attorney, at giving notice do not demand much in the way of sympathy, particularly where no actual notice could have come from any other source in connection with the Travis Air Force Base job.

(6) *Bowden v. United States* (9th Cir. December 31, 1956), 239 Fed. 2d 572; cert. denied 77 S. Ct. 864:—It is odd that petitioner seeks to rely on some conflict between the holding of the Court of Appeals of the 9th Circuit in the case at bar and in the earlier case of *Bowden v. United States*. Judge Burke in his District Court decision and the Court of Appeals in its decision in the case at bar cite, meticulously follow and rely on *Bowden v. United States*. It is also noteworthy that *Bowden v. United States* reversed the District Court, holding that a letter addressed by a subcontractor to the general contractor and listing the claim of a potential supplier or sub-subcontractor and requesting the general contractor to pay the claim was not proper notice under the Miller Act. In *Bowden* the use claimant, who prevailed below, asserted on appeal that the Act required liberal construction and argued that the letter from the subcontractor (not the claimant) to the general contractor gave the general contractor all of the information that it would have obtained if the use plaintiff-claimant had given it the written notice provided by the statute. The court states:

> "But this argument goes too far, too fast. It overlooks entirely the fact that the statute makes the requirement of written notice from the supplier a condition precedent to a right of action on the bond; and no rule of liberality in construction can justify reading out of the statute the very condition which Congress laid down as prerequisite to the cause of action. . . . It is not consistent

with either this intent or the mechanics of the statute if a prime contractor is required to choose between withholding payment to his subcontractors indefinitely or acting on peril of learning thereafter that some writing, by some person, located somewhere in his files, contains sufficient information regarding accounts between a supplier and the subcontractor to render him liable for the subcontractor's bill. . . . We do not believe that Congress intended to have it held that such little expenditure of effort is too much diligence to require of a supplier in order that he may secure his right of action on the payment bond."

The court then cites in its footnote at page 578 H. Rep. No. 1263 (74th Cong. 1st Sess.):

"One protected by the bond must be vigilant in the prosecution of his rights thereunder or take the chance of finding the bond depleted by the executions of those more prompt than he, or perhaps find the door entirely closed against his suit by limitation. 'Equity aids the vigilant'".

II. The decision in the case at bar is in complete accord with the Miller Act, the decisions of the United States Supreme Court and the decisions of the several Courts of Appeals.

The foregoing section of this brief has illustrated that there is no conflict between the case at bar and previous decisions of this Honorable Court and of the several Courts of Appeals of the various Circuits. It is respectfully submitted that not only does no conflict exist, but the Miller Act itself and the decisions of this Honorable Court and the various Circuits all support the holding in the case at bar.

The Miller Act, 40 USC 270(b), certainly, in clear and concise language, specifies that one not having a contractual relationship with the general contractor must give notice

to the general contractor within 90 days and further prescribes the method by which this notice is to be given. No court has ever held that the general contractor need not have any notice. Several courts have held that if the general contractor does have full and actual notice, the court can, and will in a proper case, relax the technical method of giving notice, which would then be an idle act. These cases do not hold, and for that matter do not intimate, that the notice provisions of the Miller Act may be completely disregarded or judicially dispensed with.

In liberally construing the Miller Act this Honorable Court has never ignored the statute and in *MacEvoy Company v. United States of America for the use of Calvin Tomkins Company*, 322 U.S. 102, 64 S. Ct. 890, 88 L. Ed. 1163, it was stated:

> "The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects. (*Fleisher Engineering & Construction Co. vs. United States*, 311 US 15, 17, 18, 85 L. Ed. 12, 14, 15, 61 S. Ct. 81; *United States use of Noland Co. vs. Irwin*, 316 US 23, 29, 30, 86 L. Ed. 1241, 1245, 1246, 62 S. Ct. 899.) But such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds."

To the same effect in *Fleisher Engineering & Construction Co. v. United States for the use of Hallenbeck*, supra, a case upon which petitioner relies, the court stated:

> "And at this bar, the actual receipt of the notice and the sufficiency of its statements have not been challenged."

Finally, and more recently this Honorable Court denied Certiorari in *Bowden v. U. S.*, *supra*, 77 S. Ct. 864, 353 U.S.

957, 1 L. Ed. 2d 968 indicating no conflict between the several circuits and an unwillingness to disregard completely the language of the Act.

The decisions of the various Courts of Appeals need not be reviewed. None of them holds that the notice requirements of the Miller Act may be totally ignored. Some of the decisions have given a liberal interpretation of the Act, stating that the method of giving notice becomes relatively unimportant if in fact the general contractor had actual notice; the cases hold nothing more.

III. Response to miscellaneous general statements contained in the petition.

On page 5 of the petition, certain misleading and in fact untrue statements are made by use plaintiff.

The fact is that use plaintiff instituted two separate actions each alleging and demanding under oath sums in excess of $40,000.00 for equipment used at each job. The pleading in the earlier action involving the Fort Funston job, action 36430, appeal 17181, is verified under oath by the attorney for use plaintiff. Being verified, it is admissible and was admitted in evidence (Volume II Record, Page 202) as an admission, by one not only presumptively authorized, but one actually authorized, according to the testimony of the principal officer of use plaintiff, it is binding upon use plaintiff. (Volume II Record Page 195). *Douds v. Scatarers International Union*, 148 F. Supp. 953; *Knuglig v. Dexter & Carpenter, Inc.*, 32 Fed. 2d 195.

The later verified contrary allegations contained in the complaint in action 36746, all of the contrary evidence and the present argument, are unequivocally impeached and eliminated by the earlier statements under oath in action 36430.

Petitioner also intimates that it was deprived of judgment for some $33,000.00. This is not the case. Petitioner, use plaintiff below, offered no evidence of any nature (beyond its contention from the stipulation entered into between use plaintiff and the defendants in the other job to use on that other job) of use of its equipment on the Travis Air Force Base job. It was, however, at the trial conceded by use plaintiff that there was no privity whatsoever between the general contractor and use plaintiff and that the liability of the parties here opposing the petition could arrive, if at all, only under the Miller Act bond (Volume II Record Page 105, 106, and 205). By no stretch of the imagination is it the problem of the general contractor and surety on the Travis Air Force Base job to show what days the equipment in question was used. The fact that the general contractor and surety on the other job were willing to stipulate to less than the total amount of use claimed on its job (while it might be greatly to the advantage of the defendants in that action), has nothing whatsoever to do with use on the Travis job or the burden of proof that use plaintiff must meet.

While the position taken in the foregoing paragraph is primarily directed at the amount of dollars and the extent of use of the equipment, the same thing applies to the matter of timely and proper notice under the Miller Act. The fact that proper notice may have been given in connection with the Fort Funston job or the fact that the general contractor and surety did not contest notice on that job does not dispense with the requirement that there be timely and proper notice in connection with the Travis Air Force Base job.

While it does not properly pertain to a petition for a writ of certiorari, use plaintiff, at page 5 of its brief, has

mislead the Court regarding the financial damage to use plaintiff. An examination of the record in the District Court will clearly show that use plaintiff has lost nothing. Use plaintiff was willing to sell the equipment to the subcontractor for the amount stipulated in the lease. If the $12,232.00 admittedly paid is added to the $7,273.33 recovered against Fidelity & Casualty Company of New York on the Fort Funston job and the sale price or reasonable value of the equipment after it was all repossessed as testified to by the principal officer of use plaintiff, the total equals or exceeds the initial agreed sale price in the lease. Accordingly, it is petitioner here who seeks another double recovery just as it sought when it filed the two separate actions in the District Court under verified complaints.

IV. No error was committed in holding that use plaintiffs Exhibit 4 was inadequate notice.

The Miller Act and the cases thereunder require that the notice inform the prime contractor that the supplier is looking to him for payment of the subcontractor's bill, that the notice be in writing addressed to the prime contractor and that the writing state with substantial accuracy the amount of rental claimed in connection with the equipment on the job in question.

While we contend that the only notice that should be considered by this Court is that referred to in the complaint, which is not Exhibit 4, we nonetheless point out to the Court that Exhibit 4 by no stretch of the imagination can satisfy the requirement of the Act and cases thereunder. Exhibit 4 is addressed not to the prime contractor, but to a different surety on a different job. While it does make reference to the Travis Air Force Base job, it totally

fails to comply with the statutory language to state "with substantial accuracy" the amount of rental claimed in connection with the equipment on the job in question. Use plaintiff exhibited, and this can be seen by referring to the various notices given, a complete familiarity with the provisions of 40 USC 270(b).

As stated by the District Judge in his opinion, Record Volume 1 Page 30:

> "A different construction of the circumstances can only be arrived at in the light of plaintiff's attempts to rise by their own bootstraps. . . . Plaintiff has failed to convince this court that there is any ground or justification for relieving him from compliance with the notice requirements of the Miller Act which are a prerequisite to his right to recover against the surety."

SUMMARY

It is respectfully submitted that certiorari should not be granted in connection with the case involving the Travis Air Force Base job for the following reasons:

a) Neither the District Court nor the Court of Appeals for the 9th Circuit have committed any error.

b) The holdings of the court below are completely in accord with the holdings of this Honorable Court and of the several Courts of Appeal.

Respectfully submitted,

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